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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DENIS DOWD,
Petitioner,

VS.

IVRON BUTLER, FRANK A. LEDFERD, DAVID CORDER, HERSHEL MARSH, DOYLE KIRKMAN, JAY M. FRENCH,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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CITATION TO THE OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals, which affirmed the award of $94,680 in attorneys' fees for work performed in the district court, is reported at 979 F.2d 661 (8th Cir. 1992) (en banc). A copy of the opinion is printed as Appendix A to petitioner's submission and therefore will not be reprinted here by respondents. The subsequent Order of the Eighth Circuit Court of Appeals, which reaffirmed the award of $94,680 in attorneys' fees for work performed in the district court and which awarded $12,000 in additional attorneys' fees for work performed in the appellate court, is not reported. A copy

of the Order is printed as Exhibit F to petitioner's submission and therefore will not be reprinted here by respondents.

STATEMENT OF THE CASE

The four inmate Plaintiffs, respondents herein, brought this action under 42 U.S.C. §1983 alleging that Defendant Denis Dowd, petitioner herein, failed to protect them from homosexual rapes in violation of their Eighth Amendment rights. The Plaintiffs were between the ages of 17 and 23 and were in the care and custody of Defendant Dowd, the Superintendent of Missouri's Farmington Correctional Center (F.C.C.), when they were homosexually raped by predator prisoners known to have aggressive and violent histories. Despite their records, the predator prisoners were housed in "general population" with the Plaintiffs in accordance with Defendant Dowd's housing policy which randomly put inmates wherever there was an available bed. Each of the Plaintiffs suffered serious emotional harm from the homosexual rapes. The depression experienced by Plaintiffs Ledferd and Marsh, for example, was diagnosed by the prison psychologist as post-traumatic stress disorder. *See* Plaintiffs' Appendix at 104-105.

After a four day trial, the jury found in favor of the Plaintiffs on the issue of liability but awarded them only $1.00 each in nominal damages. The Plaintiffs moved for a partial new trial on damages and asked for injunctive relief. Defendant Dowd moved for judgment notwithstanding the verdict. The district court denied all post-trial motions and awarded the Plaintiffs attorneys' fees in the amount of $94,680, pursuant to 42 U.S.C. §1988.

On appeal, a sharply divided Eighth Circuit Court of Appeals, sitting en banc, affirmed the judgment of the district court. All thirteen members of the Court agreed that Defendant Dowd violated the Eighth Amendment by failing to protect the Plaintiffs from a pervasive risk of sexual attack. As the majority opinion explained:

> Plaintiffs presented evidence that there were at least 100 sexual assaults reported at FCC during a three-year period. During that same time frame, however, there were almost no sexual assaults assigned to the prison investigator for investigation, and Dowd never referred even one sexual assault for prosecution. There was no warning to prisoners about the risk of sexual assault. The prison personnel had received no training or instructions about how to handle sexual assaults or how to prevent them. Prisoners were assigned to general population at random, with no segregation based on their vulnerability to assault. Dr. Sable, plaintiffs' expert, testified that this practice was reckless conduct. Plaintiffs introduced an affidavit at least implying that Dowd knew plaintiffs, and others like them, were vulnerable. Protective custody was not readily available to inmates because they were required to spend extended periods of time in administrative segregation [where conditions were harshly punitive] before being admitted to protective custody. Dr. Sable testified that this is a significant barrier to inmates requiring protection. Given this evidence presented by plaintiffs, we cannot say the district court erred by denying Dowd's motion for j.n.o.v.

See Appendix A at A26-A27. In addition, all thirteen members of the Court agreed that the award of $94,680 in attorneys' fees to the Plaintiffs' court-appointed counsel was proper. *See* Appendix A at A27-A30, A31 and A36. The Court sharply disagreed, however, on the remaining issues before it. Seven members of the Court upheld the jury award of $1.00 in nominal damages for homosexual rape; six judges deemed it a "shocking injustice" and a "miscarriage of justice." According to the dissenters, "damages resulting from rape — any rape — can never be valued at only $1.00." *See* Appendix A at A37 and A41. The Court also disagreed on the issue of injunctive relief for the Plaintiffs. Seven members of the Court refused injunctive relief;

six judges would have granted it. *See* Appendix A at A24-A25, A30, and A45-A46.

The Eighth Circuit's opinion was handed down on November 11, 1992 and the mandate was issued on December 8, 1992. On December 14, 1992, the U.S. Supreme Court decided *Farrar v. Hobby*, 113 S.Ct. 566 (1992). In *Farrar*, the plaintiff recovered nominal damages, and nothing else, for the violation of an unspecified constitutional right. The Supreme Court held that he was not entitled to any attorneys' fees under these circumstances. *Id.* at 575. The Plaintiffs had filed, on December 4, 1992, a motion for appellate attorneys' fees with the Eighth Circuit. *See* Plaintiffs' Second Verified Motion for Attorneys' Fees. On December 24, 1992, Defendant Dowd filed a response to the Plaintiffs' motion. *See* Defendant's Opposition to Plaintiffs' Second Verified Motion for Attorneys' Fees. In his response, Defendant Dowd made two basic arguments. First, he argued that *Farrar* mandates that the district court's award of $94,680 in attorneys' fees must be set aside and reduced to zero because the Plaintiffs recovered only nominal damages. To this end, he asked the Eighth Circuit to recall its mandate. *Id.* at pp. 1, 4 and 6 n. 4; *see also* Defendant's Surreply Memorandum at p. 1, filed on January 25, 1993. Second, he argued that *Farrar* mandates that the Plaintiffs must be denied all compensation for attorneys' fees incurred on appeal. *Id.* at pp. 1-6.

In a memorandum filed on January 19, 1993, the Plaintiffs replied to these arguments. *See* Plaintiffs' Reply to Defendant's Opposition to Their Second Verified Motion for Attorneys' Fees. They argued that Defendant Dowd waived his "zero fee" argument by failing to assert it in a timely fashion in the district court or in the appellate court. *Id.* at pp. 1-2. In addition, they argued that *Farrar* is distinguishable from the present case. *Id.* at pp. 4-5. They pointed out that the jury verdict in their favor was clear and unequivocal. The jury found that Defendant Dowd failed to protect them from brutal homosexual rapes in violation

of the Eighth Amendment. Such a jury verdict, they argued, serves the public interest by deterring future unlawful conduct. The jury verdict in *Farrar*, by contrast, was vague and ambiguous. Indeed, it was unintelligible. Such a jury verdict cannot deter future unlawful conduct because nobody, including the defendant, can understand what it means. In addition, the Plaintiffs pointed out that their lawsuit had prompted beneficial changes in prison policies which will decrease the risk of homosexual rape for current and future inmates at the Farmington Correctional Facility. As such, it served the public interest. The plaintiff in *Farrar*, by contrast, did not bring about any beneficial changes by filing his lawsuit.

The Eighth Circuit issued a one-page unpublished Order on February 3, 1993. In its Order the Court observed:

> In our view, the recent United States Supreme Court case of *Farrar v. Hobby*, 113 S.Ct. 566 (1992), is not directly applicable to this case, nor to the application for fees on appeal.

See Appendix F at A56. Although it did not explain its reasoning, the Court refused to recall the mandate. Thus, it left undisturbed the fee award of $94,680 for work performed in the district court. Also, the Court refused to deny attorneys' fees for work performed on appeal. Instead, it awarded the Plaintiffs $12,000 in appellate attorneys' fees. *Id.* Dissatisfied with this result, Defendant Dowd filed a petition for a writ of certiorari with the U.S. Supreme Court seeking review of the Eighth Circuit's rulings against it.

SUMMARY OF ARGUMENT

There are two basic reasons why the petition for certiorari should be denied. First, the Eighth Circuit's rulings on attorneys' fees are correct on the merits. The facts in this case are clearly distinguishable from the facts in *Farrar*. Therefore,

Farrar is not controlling. Second, *Farrar* is only four months old. It is too soon for the Supreme Court to revisit a legal issue it recently addressed only a short while ago. There will be time enough, should the circumstances warrant, for the Court to clarify the meaning of *Farrar*. In the meantime, it should exercise restraint and allow the law under *Farrar* to evolve in the lower federal courts. A remand to the Eighth Circuit for further consideration of the fee awards in light of *Farrar* would be unjustified. The Eighth Circuit has already ruled that *Farrar* is "not directly applicable to this case, nor to the application for fees on appeal." *See* Appendix F at A56. A remand under these circumstances would be inappropriate. The petition for certiorari must be denied outright.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

Defendant Dowd contends that the Eighth Circuit's rulings (1) upholding the award of $94,680 in attorneys' fees for work performed in the district court and (2) awarding $12,000 in attorneys' fees for work performed in the appellate court are contrary to *Farrar v. Hobby*, 113 S.Ct. 566 (1992). Defendant is mistaken on both counts. Each will be discussed in turn.

1. Attorneys' Fees in the District Court

At trial, the Plaintiffs succeeded in obtaining (1) a jury finding that Defendant Dowd failed to protect them from homosexual rape in violation of the Eighth Amendment; (2) $4.00 in nominal damages; and (3) $94,680 in attorneys' fees. This was no small achievement. Defendant, however, points to the U.S. Supreme Court's recent decision in *Farrar v. Hobby*, 113 S.Ct. 566 (1992), and argues that Plaintiffs cannot recover any attorneys' fees at all in this case. In *Farrar*, the Supreme Court held that a plaintiff who recovers nominal damages, and nothing else, will "often" or "usually" or "under some circumstances" not be entitled to any attorneys' fees. *Id.* at 575. Defendant argues that the only thing of value the Plaintiffs obtained in the district court was the $94,680 in attorneys' fees which, under *Farrar*, they cannot be allowed to keep. This argument fails for several reasons.

First, Defendant Dowd has waived the argument by failing to assert it in a timely fashion. Defendant never argued in the district court, or in the appellate court prior to the Eighth Circuit's opinion, that the only reasonable fee for the Plaintiffs was no fee at all. Rather, Defendant argued that the fees awarded were excessive and should be reduced. *See, e.g.*, Defendant's Opening Brief at pp. 1 and 32. By failing to argue that fees should be zero, Defendant acknowledged that the Plaintiffs were entitled to at least some fees. In its en banc opinion, the Eighth Circuit recognized this important fact:

> The argument before us is that the attorneys' fees should be reduced. This is a different issue from the question of whether a plaintiff can get attorneys' fees when they are awarded only nominal damages at trial. . . . Because this issue is not before us in this case, we do not address it.

See Appendix A at A28 n. 23. Defendant Dowd made his "zero fee" argument for the first time in response to the Plaintiffs' post-opinion motion for appellate attorneys' fees. He has no legitimate excuse for waiting until then, after the opinion and mandate had been issued, to raise an argument he could have raised in the district court or in the appellate court. There was no controlling U.S. Supreme Court decision which foreclosed Defendant from making such an argument. On the contrary, other defendants in other cases were successfully making the argument. *See, e.g., Estate of Farrar v. Cain*, 941 F.2d 1311, 1317 (5th Cir. 1991); *Spencer v. General Elec. Co.*, 894 F.2d 651, 652 (4th Cir. 1990). Because it comes too late, Defendant's argument that he is not liable for any attorneys' fees at all in this case has been waived. *Hoover v. Ronwin*, 466 U.S. 558, 574 n. 25 (1984); *United States v. Byers*, 740 F.2d 1104, 1115-1116 n. 11 and 1134-1135 (D.C. Cir. 1984).

Second, Defendant Dowd errs when he says the district court's award of $94,680 in attorneys' fees is invalid under *Farrar*. The Supreme Court did not hold that a nominal damages award will *never* justify a fee award. On the contrary, the Court refused to adopt any such per se rule. 113 S.Ct. at 575. Under what circumstances will a nominal damages award justify a fee award under *Farrar*? Justice Thomas, who wrote the majority opinion in the case, did not answer this question. However, Justice O'Connor, who joined Justice Thomas' opinion and whose fifth vote was necessary to support it, did answer the question:

> That is not to say that *all* nominal damage awards are *de minimus*. Nominal relief does not necessarily a nominal

> victory make. . . . The difference between the amount recovered and the damages sought is not the only consideration. . . . An award of nominal damages can represent a victory in the sense of vindicating rights even though no actual damages are proved. Accordingly, the courts must look to other factors. One is the significance of the legal issue on which the plaintiff claims to have prevailed. . . . [Another is] the public purpose [the] litigation might have served.

Id. at 578 (O'Connor, J., concurring). Justice O'Connor's reasoning is sound. It echoes what Justice Powell said several years ago in a concurring opinion in *Riverside v. Rivera*, 477 U.S. 561 (1986). In *Riverside*, the Supreme Court upheld a fee award of $245,456 for the recovery of $33,350 in damages. Justice Powell wrote:

> Where recovery of private damages is the purpose of a civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought. In some civil rights cases, however, the court may consider the vindication of constitutional rights in addition to the amount of damages recovered. In this case, for example, the District Court made an explicit finding that the "public interest" had been served by the jury's verdict that the warrantless entry was lawless and unconstitutional. Although the finding of a Fourth Amendment violation hardly can be considered a new constitutional ruling, in the special circumstances of this case, the vindication of the asserted Fourth Amendment right may well have served a public interest, supporting the amount of the fees awarded.

Id. at 585-586 (Powell, J., concurring). Significantly, the Eighth Circuit in this case, and Justice Thomas in the *Farrar* case, both cited Justice Powell's concurring opinion with approval. *See* Appendix A at A29; *Farrar*, 113 S.Ct. at 575.

Defendant Dowd appears to accept Justice O'Connor's concurring opinion as a correct statement of the governing law. *See* Petition for Certiorari at p. 6. At the same time, however, he stubbornly refuses to come to grips with the fact that the Plaintiffs in this case, unlike the plaintiff in *Farrar*, prevailed on a significant legal issue which served an important public interest.

The jury verdict in *Farrar*, unlike the jury verdict in the case at bar, was vague and ambiguous. Indeed, it was unintelligible. The plaintiff in *Farrar* owned and operated a home for disturbed teens. He brought a lawsuit under 42 U.S.C. §1983 alleging that the Lieutenant Governor of Texas, and other state officials, entered into a conspiracy to deprive him of his civil rights by closing the home. The jury found the Lieutenant Governor innocent of the charge of conspiracy. Nevertheless, the jury found that he had deprived the plaintiff of a civil right. *Estate of Farrar v. Cain*, 941 F.2d 1311, 1312 (5th Cir. 1991). The jury verdict was perplexing. The nature of the civil rights violation, to put it mildly, was unclear. *Id.* at 1317 (Reavley, J., dissenting). Such a jury verdict could not serve the public interest by deterring future unlawful conduct because nobody, including the defendant, could understand what it meant. Justice Thomas, in his majority opinion, was careful to point out that the plaintiff's rights had been violated in some "unspecified" way. 113 S.Ct. at 574. Similarly, Justice O'Connor, in her concurring opinion, emphasized that the jury returned a "regrettably obtuse" verdict which, because it carried "no discernable meaning," could not deter lawless conduct in the future. 113 S.Ct. at 578-579. By contrast, the jury verdict in the case at bar was clear and unequivocal. The jury found that Defendant Dowd failed to protect the Plaintiffs from brutal homosexual rapes in violation of the Eighth Amendment. *See* Appendix at A15-A17, A37, A40 and A44-A45. Such a jury verdict serves the public interest by

deterring future unlawful conduct by Defendant Dowd and others like him.[1]

A jury finding of a serious violation of the Eighth Amendment has a substantial deterrent effect. What the Plaintiffs said in the district court, almost three years ago, bears repeating here:

> This litigation has an undeniable important public character. It must be remembered here that the defendant maintained always that the plaintiffs (and others like them) were *never* at any particular risk of harm from sexual attacks by other prisoners at F.C.C. The jury said defendant was wrong, that defendant, if he did not know of it, should have known of the risk. Presumably this litigation has served an important educational role. No longer can any F.C.C. personnel say with any legitimacy that prisoners at F.C.C. are not at any risk of harm from sexual attack by other prisoners. Without doubt, this litigation has had its impact on the personalities at Farmington Correctional Center who now understand they have some accountability to those they watch over and understand also it is in their own personal interest to insure that those prisoners subject to sexual attack are properly cared for. In sum, whereas Mr. Dowd vehemently denied any obligation to protect his wards against sexual assaults, the incumbent Superintendent and his staff must realize that there is a risk of sexual

[1] Defendant mentions the fact, as if it is meaningful, that Judge Beam thought the jury verdict was vague and ambiguous. According to Judge Beam, the jury might have thought the Plaintiffs were victims of threatened, rather than actual, rape. *See* Appendix A at A32. Defendant neglects to mention the fact, however, that the other twelve members of the Court rejected Judge Beam's position. They all agreed the jury verdict was clear and unequivocal: the Plaintiffs were raped. Moreover, Defendant's argument does not come in good grace. At trial, Defendant did not deny that the rapes took place. On the contrary, Defendant's whole pitch to the jury was that the rapes took place but that he was not responsible for them. *See* Appendix A at A37 and A43.

> assault for certain prisoners, that prisoners have been and are being assaulted within F.C.C., and the failure to protect these prisoners may require that they account for their conduct in the federal district court. Thus, this litigation will likely mean that other young men will not have to endure the horror plaintiffs experienced while in the care and custody of the Department of Corrections. Although this result is important, it can *not* be measured in dollars but is a sufficient service, without more, to support the fees requested by appointed counsel.

See Plaintiffs' Reply Memorandum in Support of an Award of Attorneys' Fees at pp. 5-6, filed on July 13, 1990. The Plaintiffs' lawsuit, and their success in proving liability, will serve to deter additional unconstitutional conduct by Defendant Dowd and other prison officials. As such, the relevant indicia of success under Justice O'Connor's concurring opinion — the significance of the legal issue on which the Plaintiffs have prevailed and the public purpose served — both point to a significant victory by the Plaintiffs which justifies the district court's award of fees in the amount of $94,680.[2]

In this connection, it is important to keep in mind that a plaintiff can recover attorneys' fees when his lawsuit acts as a "catalyst" in prompting the defendant to take remedial action to meet his claim. *Hanrahan v. Hampton*, 446 U.S. 758, 756-757

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[2] Justice O'Connor recognized that in some cases a nominal damage award, if accompanied by a large fee award, will deter future lawless conduct by the defendant. 113 S.Ct. at 578-579. This is such a case. The fee award of $94,680 will serve as a vivid reminder to Defendant Dowd, and his successors, that they cannot ignore their constitutional duty to protect inmates from violent sexual assault. The Supreme Court has said it best: "the potential liability of §1983 defendants for attorneys' fees ... provides additional — and by no means inconsequential — assurance that agents of the State will not deliberately ignore [constitutional] rights." *Carey v. Piphus*, 435 U.S. 247, 257 n. 11 (1978).

(1980); *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978). That is what happened here. In upholding the award of $94,680 in attorneys' fees, the Eighth Circuit correctly noted that the Plaintiffs' lawsuit prompted beneficial changes in prison policies which serve an important public purpose:

> The record reflects that the litigation did serve the interests of prisoners other than the plaintiffs, as the defendant subsequently instituted some of the safety measures requested by the plaintiffs. . . . Specifically, the FCC instituted a new policy requiring that the doors of all prisoners be open during its "open wing" period.

See Appendix A at A29 and n. 25. This was an important victory for the Plaintiffs because the evidence at trial showed that they were often raped by other inmates behind closed cell doors during "open wing" hours at the prison. *See* Appendix A at A5-A8, A10, A24 and A42; *see also* Tr. IV at 52-53, 86-87.

Significantly, the Eighth Circuit referred to safety measures (plural) and not to safety measure (singular). There were other remedial measures which Defendant Dowd took in response to the Plaintiffs' lawsuit. For example, he instituted a "standing count" system for the night lockdown. Previously, prison guards merely counted bodies; they made no effort to determine whether the right inmates were in the right cells. As a result, predator inmates were able to hold the Plaintiffs captive overnight in cells and repeatedly rape them. *See* Appendix A at A4, A6, A8, A42 and A46. Defendant Dowd changed the policy so that inmates must present themselves at their cell doors for the night count. *See* Tr. II at 65-66; Tr. III at 132-133. Also, there was no classification system at the prison prior to the Plaintiffs' lawsuit. Inmates were assigned to cells at random; no effort was made to separate non-violent inmates from violent inmates. *See* Appendix A at A12 and A26. Six months after the lawsuit was filed, however, Defendant Dowd instituted a classification system. *See* Appellant's Appendix at 2; Tr. III at 63-65.

Without doubt, homosexual rape interferes with an inmate's rehabilitation. In addition, it interferes with order and discipline in the prison. These are compelling governmental concerns. *Thornburgh v. Abbott*, 490 U.S. 401, 415 (1989); *Pell v. Procunier*, 417 U.S. 817, 823 (1974). The Eighth Circuit correctly recognized that the Plaintiffs' lawsuit has prompted remedial action by the Defendant which will further the public goals of rehabilitation, and order and discipline in the prison, by decreasing the risk of homosexual rape for countless numbers of current and future inmates at the Farmington Correctional Center. Therefore, it correctly upheld the district court's award of $94,680 in attorneys' fees.[3]

Farrar does not undermine the Eighth Circuit's reasoning. The plaintiff in *Farrar* did not bring about any beneficial change by filing his lawsuit. By contrast, the Plaintiffs here did. At least three federal appellate courts have held, in cases decided after *Farrar*, that the "catalyst" theory for an award of attorneys' fees remains valid. *Paris v. U.S. Department of Housing and Urban Development*, No. 92-1763 (1st Cir., Mar. 4, 1993); *Citizens Against Tax Waste v. Westerville City School*, No. 91-3924 (6th Cir., Feb. 3, 1993); *Pembroke v. Wood County, Texas*, 981 F.2d 225 (5th Cir., Jan. 20, 1993). The Fifth Circuit's recent decision in *Pembroke* is particularly instructive. In *Pembroke*, prisoners at a county jail brought a lawsuit under 42 U.S.C. §1983 alleging that conditions at the jail violated their constitutional rights. In response to the lawsuit, the defendants corrected the unconstitutional conditions. As a result, the plaintiffs were denied declaratory and injunctive relief. They did not seek any monetary relief.

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[3] Defendant Dowd suggests there was no causal connection between the Plaintiffs' lawsuit and the safety measures he adopted. However, the Eighth Circuit, which is intimately familiar with the litigation, found that such a causal connection existed. In making this finding, the Court acted within the wide latitude accorded to it. The Supreme Court is in no position to second-guess the Eighth Circuit's factual determinations.

On appeal, the Fifth Circuit held that the plaintiffs were nevertheless entitled to an award of reasonable attorneys' fees:

> *Farrar* dealt with prevailing party status and the award of attorneys' fees in the context of nominal damages and is thus distinguishable from the present case. . . . Unlike *Farrar*, changes in the legal relationship between the plaintiffs and defendants in this case were wrought by the bringing of the litigation itself, not with recovery of monetary damages. Thus, although the plaintiffs received no monetary award, they are still entitled to an award of reasonable attorneys' fees.

981 F.2d at 231 n. 27. The same reasoning applies with equal force to this case. The Plaintiffs here, like the plaintiffs in *Pembroke*, brought about important beneficial changes in prison policies which warrant a fully compensatory award of attorneys' fees.[4]

Defendant suggests that even if the award of $94,680 in attorneys' fees cannot be reduced to zero under *Farrar* a "dramatic reduction" is necessary in light of the "limited success" achieved by the Plaintiffs. The Eighth Circuit, however, has expressly addressed and rejected this argument:

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[4] Defendant portrays this case as one about money only. This is incorrect. Plaintiffs' amended complaint, filed by court-appointed counsel, did *not* request any particular dollar amount in damages. Moreover, Plaintiffs' counsel did *not* ask the jury to award the Plaintiffs any particular dollar amount in damages. Plaintiffs' ultimate focus in this case was not dollars but exposure of the state's indifference to their plight. This is evident from a letter written by Plaintiffs' counsel to Defendant's counsel prior to trial: "So far I have talked with plaintiffs about transfers, money and changes in procedures and practices. . . . Assuming the necessary 'monies' were available, a settlement would not promote the change [the plaintiffs] believe necessary in the procedures and practices at the FCC. Plaintiffs figure the only way to achieve the change they believe necessary is to alert the public of their circumstances and that a trial will help get that job done." *See* Plaintiffs' Reply Memorandum, *supra*, at p. 4.

> [T]he magistrate judge specifically considered the level of success in calculating his award. The magistrate judge stated that . . . "the measure of success in Civil Rights litigation of this type is not limited to the monetary damage award. There is inherent value in a determination that one's constitutional rights have been violated . . . ." The record reflects that the litigation did serve the interest of prisoners other than the plaintiffs as the defendant subsequently instituted some of the safety measures requested by the plaintiffs . . . . In addition, the Court awarded attorneys' fees to counsel based on a flat hourly rate of $100.00 even though plaintiffs' lead counsel presented substantial evidence supporting a fee of $175.00 an hour for his time.

See Appendix A at A29. The Eighth Circuit's reasoning is sound and does not conflict with *Farrar* in any way. On the contrary, it is fully consistent with Justice O'Connor's controlling view that courts must consider (1) the significance of the legal issue on which the plaintiff has prevailed and (2) the public purpose served by the litigation. Moreover, as the Eighth Circuit noted, the district court has *already* made a "dramatic reduction" in the fee award for work performed in the district court by slashing lead counsel's hourly rate by 43%. No further downward adjustment is justified and the district court's award of $94,680 in fees must be left undisturbed.

There is no merit to Defendant Dowd's argument that the Supreme Court should "summarily reverse" the Eighth Circuit's judgment. Summary reversal is an exceptional disposition reserved for those rare cases where the lower court's ruling is so patently erroneous that full briefing and oral argument would be a waste of time. *See* Stern, Gressman and Shapiro, *Supreme Court Practice* §5.12 (Sixth ed. 1986). That is not the situation here. The facts here are clearly distinguishable from the facts in *Farrar*. Accordingly, *Farrar* does not dictate reversal of the Eighth Circuit's judgment.

Alternatively, Defendant argues that the Supreme Court should remand the case to the Eighth Circuit for further consideration of the fee award of $94,680 in light of *Farrar*. The problem with this argument, of course, is that the Eighth Circuit has already considered the impact of *Farrar* on this case. The Court ruled that *Farrar* is "not directly applicable to this case, nor to the application for fees on appeal." *See* Appendix F at A56. Without doubt, the Court believed the challenged fee award was valid under *Farrar*; otherwise it would have vacated it. The mandate was issued on December 8, 1992; *Farrar* was decided on December 14, 1992. Defendant Dowd specifically asked the Eighth Circuit to recall the mandate and to set aside the fee award in light of *Farrar*. This was a predictable request. Appellate courts will routinely recall the mandate to give effect to a supervening decision of the U.S. Supreme Court. *See, e.g., Zipfel v. Halliburton Co.*, 861 F.2d 565, 567-568 (9th Cir. 1988); *Judkins v. Beech Aircraft Corp.*, 745 F.2d 1330, 1331-1332 (11th Cir. 1984). The Eighth Circuit refused to recall the mandate, however, and elected instead to leave the fee award intact. Thus, the Eighth Circuit made a clear decision to reaffirm the award of $94,680 in attorneys' fees despite the *Farrar* case. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 378-379 n. 1 (1990); *Clinkenbeard v. Central Southwest Oil Corp.*, 526 F.2d 649, 651-652 (5th Cir. 1976). The Court's decision sinks Defendant's remand argument. The Supreme Court cannot remand the case to the Eighth Circuit, with directions to consider the impact of *Farrar* on the case, when the Eighth Circuit has *already* considered the impact of *Farrar* on the case. The Supreme Court must either grant certiorari, and set the case for full briefing and oral argument, or it must deny certiorari outright. There is no middle course to follow.

Defendant's reliance on *Nichols v. Romberg*, 113 S.Ct. 1038 (Jan. 19, 1993), and *Kolodzieczak v. Friend*, 113 S.Ct. 1038 (Jan. 19, 1993) is misplaced. To be sure, the Supreme Court remanded these cases to the Ninth Circuit for further consideration of the

fee awards in light of *Farrar*. But the cases were remanded because the Ninth Circuit never had the opportunity to consider the impact, if any, of *Farrar* on the fee awards. The *Nichols* case was decided five months before *Farrar*; the *Kolodzieczak* case was decided seven months before *Farrar*. The Eighth Circuit, by contrast, has ruled that *Farrar* does not apply to this case. *See* Appendix F at A56.[5]

2. Attorneys' Fees in the Appellate Court

On appeal to the Eighth Circuit, Defendant Dowd argued that (1) he was not liable at all for the homosexual rapes; (2) the jury instruction on liability was erroneous; and (3) the award of $94,680 in attorneys' fees was excessive in light of the results obtained. He lost on all three issues. As a result, the Eighth Circuit awarded the Plaintiffs $12,000 in appellate attorneys' fees for time expended by their counsel in successfully resisting the Defendant's arguments. The award was not contrary to *Farrar*. As discussed, the Plaintiffs achieved an important victory in the district court which served the public interest. Because they succeeded on appeal in preserving this important victory, they were entitled to the $12,000 in appellate attorneys' fees. There is no warrant to upset the Eighth Circuit's award and it should be left undisturbed.

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[5] The Eighth Circuit mused in passing that "had the *Farrar* decision been issued prior to the filing of the en banc opinion in this case, it may well have altered our view as to the allowability of fees at the trial." *See* Appendix F at A56. But this gratuitous dictum cannot be construed to contradict the Court's clear holding that *Farrar* is "not directly applicable to this case, nor to the application for fees on appeal." *Id.* As noted, if it thought the challenged fee award was invalid under *Farrar*, the Court would have vacated it. Significantly, it did not. With courts, as with people, actions speak louder than words.

CONCLUSION

Petitioner has failed to demonstrate the existence of any special or important reasons why a writ of certiorari should be granted in this case. *See* Sup.Ct. Rule 10. Accordingly, the writ should be denied.

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